

EVANS DECLARATION EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
ANDREA TANTAROS,

Plaintiff,

- against -

FOX NEWS NETWORK, LLC, ROGER AILES,
WILLIAM SHINE, DIANNE BRANDI, IRENA
BRIGANTI, and SUZANNE SCOTT,

Defendants.
----- X

Index No. 157054/2016

Justice David B. Cohen

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true copy of an order in this matter that
was entered in the office of the Clerk of the Supreme Court, New York County, on the 13th day
of March, 2017.

Dated: New York, New York
March 13, 2017

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1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM PART 58

3 ANDREA TANTAROS,

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4 - against -

5 FOX NEWS NETWORK, LLC, ROGER AILES,
6 WILLIAM SHINE, DIANNE BRANDI, IRENA
BRIGANTI, and SUZANNE SCOTT,

Defendants.

7 INDEX NO. 157054/16

111 Centre Street
New York, New York
February 15, 2017

9 BEFORE:

10 THE HON. DAVID B. COHEN, J.S.C.

12 APPEARANCES:

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24 JACK L. MORELLI
Senior Court Reporter

PROCEEDINGS

1 THE COURT: Good afternoon. This is Andrea
2 Tantaros against Fox News Network, LLC, Roger Ailes,
3 William Shine, Dianne Brandi, Irena Briganti and Suzanne
4 Scott, under Supreme Court index 157054 of 2016. Starting
5 with plaintiff's counsel, put your appearance on the
6 record.

7 MR. BURSTEIN: Good afternoon, Your Honor. Judd
8 Burstein, of Judd Burstein, P.C., for the plaintiff.

9 MR. LEVANDER: Your Honor, good afternoon.
10 Andrew Levander with Linda Goldstein, from Dechert. We
11 represent Fox and the other individuals except for Roger
12 Ailes.

13 MR. CALAMARI: Peter Calamari, and sitting in
14 the box is Joseph Sarles, from Quinn Emanuel, and we
15 represent Roger Ailes.

16 THE COURT: Did you want to put your additional
17 members or associates on the record as well or at least
18 their names?

19 MR. LEVANDER: I think that's fine, Your Honor.

20 THE COURT: Okay. I read the papers, I'm ready
21 for argument. At this time who is arguing for Fox, Mr.
22 Levander?

23 MR. LEVANDER: Yes, Your Honor.

24 THE COURT: You may proceed.

25 MR. LEVANDER: Thank you, Your Honor. May it

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1 please the Court, the motion before the Court, as the
2 Court undoubtedly is aware, concerns a broad arbitration
3 clause in an employment contract. Ms. Tantaros was very
4 sophisticated, she signed that employment contract with
5 Fox containing that express broad arbitration clause not
6 once but twice, and she was represented by a sophisticated
7 talent agency.

8 THE COURT: By broad you mean it doesn't
9 reference any specific types of claims in it?

10 MR. LEVANDER: Correct.

11 THE COURT: That's one of the plaintiff's
12 arguments, isn't it, that that is the failing of this

13 *clause?*
clause

14 MR. LEVANDER: Yes, but that's not the law. But
15 if you want me to get to that right now I can, but I was
16 going to build my way there. But I'm happy to fire away.

17 THE COURT: As you wish, counsel, we'll get to
18 it.

19 MR. LEVANDER: The broad clause does say, any
20 controversy, claim or dispute arising out of or relating
21 not only to the agreement but her employment, and any such
22 claim has to be arbitrated. Under both federal and state
23 law that provision needs to be enforced. Indeed there is
24 a strong policy in favor of arbitration reflected in the
25 CPLR, Federal Arbitration Act and a plethora of cases over

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1 the last 50 ^{years} year or more, including the New York Court of
2 Appeals case in Smith Barney versus Luckie, which the New
3 York Court of Appeals directed the lower courts to
4 "rigorous judicial enforcement of arbitration agreements."
5 The Westinghouse case, New York Court of Appeals did the
6 same, and the Supreme Court of the United States has also
7 issued its opinions. I'm talking about the strong policy
8 in favor of arbitration.

9 THE COURT: Is that the Hirschfeld case you're
10 referring to?

11 MR. LEVANDER: That's the New York Court of
12 Appeals case. Supreme Court of the United States would be
13 Moses Cone Memorial Hospital, it would be
14 Shearson/American Express versus McMahon. There is a
15 plethora of cases, Your Honor. Indeed the 2nd Circuit has
16 observed in Arciniaga versus General Motors, 460 F.3d at
17 page 234, "It is difficult to overstate the strong federal
18 policy in favor of arbitration." And that's the law in
19 New York as well.

20 Based on those cases, those principles and the
21 authority on point that I will now discuss, we believe
22 that the motion to compel arbitration should be plainly
23 granted. Indeed, Your Honor, plaintiff has flouted the
24 terms of her contract, including the arbitration clause,
25 in bringing this case, in the various publicity stunts she

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1 has engaged in.

2 The argument that they make, however, ignores
3 overwhelming precedent. I will focus on the three issues
4 that counsel raises, as I understand them, as to why she
5 should be allowed out of her arbitration clause and to be
6 able to litigate in court.

7 As I understand it, her first argument is,
8 although I'm compelled to arbitrate certain claims, I
9 don't have to arbitrate sexual harassment claims. And
10 that's because the words sexual harassment don't appear in
11 the broad clause, as Your Honor referenced a few moments
12 ago. That is simply not the law. Plaintiff does not cite
13 a single case in which a Court has held that a broad
14 employment arbitration clause in an employment agreement
15 that encompasses any claim relating to her employment,
16 does not encompass sexual harassment, whether or not the
17 arbitration clause contains the words sexual harassment,
18 it's just not a requirement of the law to the contrary.

19 She cites a couple of cases in which the Court
20 has noted the full term of the language that the ^{clauses}
21 arbitration clause, and some arbitration ~~clauses~~ do have
22 ^{things} Things like "any claim including but not limited to." But,
23 for example, in Cicchetti versus Davis, which is a
24 Southern District case in 2003, but the --

25 THE COURT: Isn't it sufficient if a clause says

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1 essentially the same thing as her clause, if it says any
2 claim and specifies a few, isn't that essentially the
3 same?

4 MR. LEVANDER: In our view it's exactly the same
5 whether it says including but not limited to or it doesn't
6 have the including but not limited to, any claim means any
7 claim and that's what we have here.

8 Indeed, in Cicchetti, one of the cases she
9 relied on, while it drops a footnote that says, "The
10 language has the including but not limited to sexual
11 harassment." The analysis of the Court was that it was
12 because the arbitration clause related to "all her
13 employment." Precisely what the arbitration clause in
14 this case does.

15 As I said, Mr. Burstein has not cited a single
16 case in which a Court has said, okay, you have a broad
17 thing that says any claim relating to employment. But you
18 didn't put in the words sexual harassment and therefore,
19 we're not going to allow arbitration of the sexual
20 harassment claim; not a single one.

21 Indeed, in Tong versus S.A.C. Capital
22 Management, which is a 1st Department case from 2008 which
23 you cited in approval in your Siroy, decision recently,
24 "The clause that was held to encompass claims under both
25 the New York State and the New York City Human Rights

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1 Laws," exactly the claims that are in this case, "was
2 exactly the same as the clause in our case relating to
3 anything under your employment agreement." No reference
4 to sexual harassment. Nonetheless, the 1st Department
5 ordered, compelled arbitration.

6 THE COURT: But how does the contract alleged
7 fall within the scope of employment?

8 MR. LEVANDER: That's simple, Your Honor, if you
9 just read the complaint. And the complaint, I will
10 particularly refer you to, and that's the whole thing, but
11 if you look at paragraphs 14 through 18 --

12 THE COURT: I've read the complaint, counsel.

13 MR. LEVANDER: It says, "Every act that occurred
14 here occurred on the premises."

15 THE COURT: In New York.

16 MR. LEVANDER: Of Fox in New York.

17 THE COURT: I know.

18 MR. LEVANDER: And the claims are all based on
19 our status as an employer. So this is quintessentially an
20 employment place claim. This is not -- you know, he cites
21 as an exception the case, for example, where an employee
22 is off premises and there is a social interaction not part
23 of business and a sexual assault is alleged. That's not
24 what this case is about. What this case is about is,
25 allegedly systematic conduct at Fox, at the news station,

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1 that sexual harassment. And if it wasn't related to --

2 THE COURT: Are you contending that if the
3 sexual assault took place in Fox's premises that that
4 would fall within the scope of employment?

5 MR. LEVANDER: I actually think it would. But
6 we don't have to cross that bridge in this case. The case
7 here is, the only way we're liable is as an employer.
8 This is quintessentially an employment case, therefore it
9 is encompassed. And even Mr. Burstein doesn't make that
10 argument -- but if he did make the argument that it was
11 unrelated to employment, he would automatically lose his
12 - New York State, New York City Human Rights Law claims
13 because they are only bringable [sic] against an employer.

14 So, the same is true in the 2nd Circuit's case
15 called Oldroyd, 134 F.3d 72. And there the holding was a
16 federal statutory whistleblower claim is encompassed by an
17 arbitration clause that says, "Any claim arising under the
18 employment agreement." No reference to harassment. No
19 reference to whistleblower. No reference to anything
20 else, just a broad clause; exactly as we have here.

21 We've cited to Your Honor a host of other cases
22 which uniformly hold the same thing. There is a Fox case,
23 there is a Gateson case, there is a Valdes case, all in
24 the Southern District, in which arbitration has been
25 compelled in harassment cases based on a clause that is

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1 identical or indistinguishable from the clause in our case
2 which is, "Any claim, controversy or dispute relating to
3 your employment agreement or your employment."

4 The cases apply this principle uniformly. For
5 example, Mr. Burstein cites the Coors case in the 10th
6 Circuit. But the Coors case is exactly on point. It's
7 not a harassment case, it's an antitrust case. There it
8 says, any claim relating to the contract. The Court says,
9 well, you're compelled to. In the antitrust case cited in
10 the Supreme Court case in Mitsubishi, Supreme Court of the
11 United States saying, you've got -- it doesn't matter that
12 it doesn't say antitrust, it's related to the contract..
13 End of story, you go arbitrate. That is the federal
14 policy that's involved here. Indeed, Your Honor, your
15 Siroy decision, I believe --

16 THE COURT: Which you smattered through the
17 brief at every opportunity.

18 MR. LEVANDER: I may not have done it enough but
19 I tried. But I think that it's pretty on point. In Siroy
20 there was a forum selection clause which is similar to
21 a --

22 THE COURT: But not the same.

23 MR. LEVANDER: Not the same. But you cited a
24 bunch of the arbitration cases that are on point.

25 THE COURT: But there aren't a lot of forum

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1 selection clauses.

2 MR. LEVANDER: But the principle was that was a
3 forum selection clause which said any claim. It didn't
4 include the sexual harassment claim. But you said
5 nonetheless, this case gets shipped to New Jersey, I
6 believe it was. And you cited, even though there was no
7 reference to sexual harassment in the clause, and you
8 cited Tong, the 1st Department case I mentioned a moment
9 ago which is right on point and I think controlling here.
10 The petition of Levitt, another arbitration case in which
11 the same principle applied and you cited those two cases
12 with approval as compelling your decision.

13 Now, there is also a suggestion in his brief
14 that somehow because it's sexual harassment that deserves
15 to be in a courtroom notwithstanding the arbitration
16 clause, and that doesn't fly. In fact, the Supreme Court
17 in 1991 in the Gilmore case specifically threw that
18 principle out, rejected it and says, "Harassment claims by
19 any other claims, discrimination claims, should be heard
20 pursuant to arbitration if that's what the clause covers."
21 And the New York Court of Appeals followed Gilmore shortly
22 thereafter in Fletcher versus Kidder Peabody, a 1993
23 decision which, again, ironically, Mr. Burstein cites in
24 his brief with approval.

25 Indeed, in Guyden versus Aetna, 544 F.3d in the

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1 2nd Circuit 2008, the Court specifically held, "That the
2 inability of an employee to publicly air their
3 whistleblower claim under statute does not give rise to
4 vitiating an arbitration clause." Right on point.

5 Second argument that he makes, as I understand
6 it, even he describes it is unprecedented, I would
7 describe it as frivolous, the notion that after the
8 arbitration clause was signed, two years later after there
9 is a torrent of public stunts and public appearances by
10 plaintiff and her lawyer, in which even Mr. Burstein
11 acknowledged that he would probably be violating the
12 contract of his client, that the Fox News issued a
13 statement that said, "We've already filed an arbitration
14 claim against Ms. Tantaros."

15 THE COURT: Now, did that claim make it into the
16 news? It seemed like it may not have, right?

17 MR. LEVANDER: If it was -- it did not.

18 THE COURT: Did that get reported in the end?

19 MR. LEVANDER: I never saw it.

20 THE COURT: Okay.

21 MR. LEVANDER: Whatever one's view of whether or
22 not that anodyne statement is a violation of the
23 confidentiality agreement in a contract, that's a contract
24 claim that must be arbitrated, not a basis to vitiate an
25 arbitration clause.

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1 THE COURT: So, you send to arbitration a claim
2 as to whether or not arbitration was vitiated by some
3 waiver?

4 MR. LEVANDER: No, we've made an arbitration
5 claim based on the fact that she published a book without
6 getting preapproval and said that violated her contract.
7 That's our pending arbitration claim. They then brought
8 this case and in response to we issued -- after they were
9 on TV, radio, newspaper --

10 THE COURT: Then you brought this motion?

11 MR. LEVANDER: And then we brought this motion.
12 We never litigated anything about the defense of this
13 case. We've never done anything but immediately bring an
14 action to compel arbitration. The only way --

15 THE COURT: But how do you respond to
16 plaintiff's argument that you waived your right to compel
17 arbitration under the arbitration clause by violating the
18 confidentiality of the arbitration?

19 MR. LEVANDER: Because the case law is
20 overwhelming. Waiver only occurs when you litigate, okay?
21 Making a statement is not litigation. Actually litigate,
22 protracted litigation is the standard which actually
23 prejudices the other party. I can cite, those are the
24 exact words of the PPG Industries versus Webster case in
25 the 2nd Circuit, Thyssen versus Calypso Shipping in the

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1 2nd Circuit, and the New York Court of Appeals decision in
2 Cusimano versus Schnurr. In fact, in Cusimano the New
3 York Court of Appeals emphasized that the waiver turned on
4 the protracted use of the courts. A statement
5 out-of-court is not the use of the courts to the actual
6 prejudice of the other party. That's the standard and
7 that didn't occur here. Nothing was prejudicial.

8 THE COURT: Counsel, two more minutes and I
9 think that you probably want to get to the claim as to the
10 individuals.

11 MR. LEVANDER: Yes, I do.

12 THE COURT: Because you have several of them as
13 well.

14 MR. LEVANDER: Yes. So, I also just want to
15 point out before I do though, that there are at least two
16 very good cases to read about that, "All acts of the
17 parties subsequent to the making of the contract which
18 raised issues of facts or law lie exclusively with the
19 arbitrator." Here you have a post-contract statement, in
20 fact, a post-arbitration statement. That's their basis,
21 it goes to the arbitrator. We violated the contract, the
22 arbitrator can find that. Finally, you can't avoid an
23 arbitration clause by suing your employer, that's Black
24 Letter Law also.

25 In Hirschfeld Products, which Your Honor

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1 referred to earlier, against Mirvish, the 1st Department
2 which was subsequently affirmed by the Court of Appeals
3 explained there, "The attempt to distinguish officers and
4 directors from the corporation they represent for the
5 purposes of evading an arbitration provision is contrary
6 to the established policy of this state." Subsequently in
7 the Court of Appeals, the Court of Appeals affirmed that
8 holding and said, that under New York and federal law the
9 arbitration clause of the employer extends to quote, "Any
10 agent of the employer." 88 NY2d at 156.

11 More recently still in DiBello versus Salkowitz
12 in the 1st Department, the Court held, "The enforceability
13 of the arbitration agreement is not affected by the
14 statutory nature of the discrimination claims. And given
15 the employment related nature of the claims, the
16 individual employee defendant as an agent of the employer
17 is entitled to demand arbitration of the claims against
18 him, no less than the employer is entitled to demand
19 arbitration of the claims against it. That is the 1st
20 Department's holding in DiBello.

21 The 2nd Circuit has numerous cases holding to
22 the same effect, including Ragone and Powers. Indeed, in
23 the 2nd Circuit in Roby versus Lloyd's, which is one of
24 the cases you cited with approval in Siroy, the Court
25 stated, 2nd Circuit stated, "In this and other circuits

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1 consistently have held that employees of any entity,
2 employee of any entity that is party to an arbitration
3 agreement are protected by that agreement."

4 The 2nd Circuit has also emphasized that when
5 you're moving to compel arbitration the standard is even
6 easier if the party that you were moving to compel against
7 is the one that signed. So here she signed, she agreed to
8 arbitration. Any claim to avoid arbitration is less
9 strong under those circumstances.

10 THE COURT: You may conclude, counsel.

11 MR. LEVANDER: I'm going to hold the rest of my
12 time for rebuttal. Thank you.

13 THE COURT: You may be seated.

14 Mr. Calamari.

15 MR. CALAMARI: Yes, Your Honor, I'll be very
16 brief. I just join in the arguments of Mr. Levander. The
17 cases are absolutely clear here. There is just no law to
18 support the position of plaintiff's counsel. And I'll, if
19 I may, reserve my time for rebuttal.

20 THE COURT: I believe we reserved three minutes
21 for rebuttal on the defense side.

22 MR. LEVANDER: Thank you, Your Honor.

23 THE COURT: Okay. I think that you probably
24 were a minute under, so I'll give you that additional
25 minute if you need it, okay?

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1 Mr. Burstein, you're up.

2 MR. BURSTEIN: I'll try and talk quickly and try
3 and work backwards. I don't dispute that there is a
4 presumption in favor of arbitration. But I also I don't
5 think that the other side can dispute that one shouldn't
6 have to arbitrate if you haven't agreed to arbitrate.
7 Although there are many cases that say that an employer,
8 an employee can be required to arbitrate against other
9 executives, for example, when there is a broad arbitration
10 clause; this case is different. Everybody is pointing to
11 Siroy but let me tell you why Siroy is actually helpful to
12 me. In Siroy you pointed out three different situations
13 where admittedly in a forum selection clause where another
14 nonparty to the agreement might be entitled to
15 arbitration. The two that are sort of relevant is
16 third-party beneficiary and the third which is so close
17 that it's all interrelated. One could argue under normal
18 circumstances that we might fall within the third
19 category, but this case is different. I don't know if
20 you've seen the entire agreement, Your Honor, and I have a
21 copy.

22 THE COURT: I've seen all portions of the
23 agreement that were in the papers, so I have everything
24 that's in the record.

25 MR. BURSTEIN: Okay, well, what's in the record

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1 then in our opposition papers is 15.1 of Ms. Tantaros's
2 agreement. It's one of the exhibits to my affidavit.
3 There are so many papers here. *affirmation*

4 THE COURT: Is it you're saying 15.1, "This
5 agreement is non-assignable by performer"?

6 MR. BURSTEIN: Yes.

7 THE COURT: I'm looking at it.

8 MR. BURSTEIN: So what 15.1 says is, "That this
9 agreement shall inure to the benefit of Fox's successors,
10 assignees, affiliates." It says, "As used in this
11 agreement the term 'affiliate' shall mean any company
12 controlling, controlled by or under common control with
13 Fox."

14 THE COURT: So what that would mean if Fox was
15 acquired, right, and Fox's employees were covered, then
16 the acquiring entity employees would be covered as well,
17 right?

18 MR. BURSTEIN: No. Respectfully, I think that
19 if, in fact, there were another provision in this
20 agreement that protected employees, perhaps. But this
21 provision can only be read one way, that this is an
22 agreement, as some parties do, they have an agreement
23 where they say there are no third-party beneficiaries and
24 this agreement is only for the benefit of certain people.
25 There is no definition of Fox in the agreement to include

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1 employees or anyone else. That's why this case is
2 fundamentally different than any other case, because --

3 THE COURT: But doesn't this provision deal with
4 issues if Fox is acquired or merges or something else like
5 that? How does that exclude employees?

6 MR. BURSTEIN: It does, because it's made a part
7 of the agreement. And the part of the agreement that it's
8 made a part of are standard conditions of employment.
9 This is an agreement between Fox News and Andrea Tantaros.
10 The agreement includes not only the part that is specific
11 to Ms. Tantaros, but says the standard conditions of
12 employment also apply. There are all sorts of provisions
13 in here that are not talking about, you know, mergers,
14 they are talking about when a performer can perform
15 services. What rights the performer has.
16 Indemnification, commissions, Internet restrictions,
17 promotions, injunctive relief. This is all specific to
18 the employee. And if an employer --

19 THE COURT: I think a lot of that stuff is
20 blacked out in the papers.

21 MR. BURSTEIN: I can give you a full set.

22 THE COURT: It was redacted for a reason and it
23 wasn't in the papers, so.

24 MR. BURSTEIN: But it's a public -- I wanted to
25 be careful as to the other side since it's theoretically a

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1 confidential agreement, I didn't want to put in anything
2 other than what was absolutely necessary. But I think
3 that Mr. Levander will agree, that this is not some single
4 part of the agreement. I think it would be helpful to
5 allow me to supplement the record with a copy of the
6 entire agreement. Because you will see that it -- when
7 two parties enter into a contract and they say this is
8 only for the benefit of the two parties, and with respect
9 to Fox it's only with respect to Fox and its affiliates
10 and this is how we define Fox and affiliates, and there is
11 no definition of Fox News. If you look at the first --
12 well, you don't have it but there is no definition of Fox
13 as Fox including its employees.

14 THE COURT: I know you're trying to convince me
15 that this agreement somehow excludes the employees. But
16 it says this agreement is nonassignable by performer.
17 Which means your client can't assign it but Fox can. But
18 it doesn't say anything about whether employees are or are
19 not considered. This deals with the assignment of the
20 agreement to any future entity, which hasn't happened in
21 this case. But it doesn't exclude -- show me how it
22 excludes employees at this time.

23 MR. BURSTEIN: Well, there is one thing where it
24 says it has the right to freely assign. I'm not relying
25 on that language. I'm relying on the language which says,

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1 "This agreement shall inure to the benefit of Fox's
2 successors, assignees and affiliates." Affiliates is
3 important, it's not just about selling the company. It's
4 about, for example, I guess, 21st Century Fox or Fox
5 Business News. They could have added "and employee."
6 They could have defined and -- it's interesting, their
7 reply papers are silent on this issue. You can't find
8 anything on it.

9 So it seems to me that the plain language of
10 this agreement, and you see this all the time in
11 agreements when they want to exclude third-party
12 -- beneficiaries, they want to keep people -- they want to
13 make sure that this is only going to be for the benefit of
14 the parties to ^{the} agreement, not give third parties rights.
15 That is precisely what happened. And it's not remotely
16 found in their reply. They've never addressed this issue.
17 So, the record stands with my argument. The reason they
18 haven't addressed this issue is, they know it would be
19 frivolous to address it because that's what the agreement
20 says.

21 Now, there is another important point here, this
22 case, although it was given short shrift of the arguments
23 of mine that were characterized, I didn't quite recognize.
24 But one of the arguments --

25 THE COURT: That's why you get a chance to talk,

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1 counsel.

2 MR. BURSTEIN: But one of the arguments that I
3 do think is a question of first impression and is very
4 important is the arbitration clause itself. Now, this is
5 a situation --

6 THE COURT: This is the waiver claim?

7 MR. BURSTEIN: It's not a waiver claim.

8 THE COURT: It's not?

9 MR. BURSTEIN: It's a breach claim for the
10 following reason. I mean --

11 THE COURT: But the breach has to result in a
12 waiver, right?

13 MR. BURSTEIN: Yes. Well, excuse of
14 performance.

15 THE COURT: Let's get to breach.

16 MR. BURSTEIN: You have, unlike any other kind
17 of agreement I've ever seen, an arbitration clause that
18 has an arbitration clause that has a strict
19 confidentiality provision and says, "The violation of this
20 clause will be a material breach of the agreement." Now,
21 you'll never see that. And this is why it's important.
22 The law, if you take the law generally, what do you have?
23 You have a situation where a party claims a contract has
24 been breached or he or she has been defrauded into
25 agreeing to the contract. The law is very clear, that

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1 doesn't do you any good in terms of getting out of an
2 arbitration agreement unless you can show that the
3 arbitration agreement itself was procured by fraud.

4 THE COURT: Let's talk about who is in breach
5 here, counsel, because the other side says that you're in
6 breach. When I say "you," I mean not just your client,
7 your individual involvement in breaching that
8 confidentiality. Typically in contract claims situations
9 the focus is on who breached first, right? Who made the
10 initial breach. Because that often excuses the other
11 party from their breach, doesn't it?

12 MR. BURSTEIN: Yes, but the complaint --

13 THE COURT: How does that not apply here?

14 MR. BURSTEIN: For two reasons. One, the
15 complaint alleges, and I can give you the paragraph, a
16 prior breach which was the failure to provide a personal
17 assistant over the three years. And that is --

18 THE COURT: But that's not a breach of the
19 confidentiality provision or the arbitration clause,
20 right? That would be subject to arbitration under this
21 agreement. You agree to that?

22 MR. BURSTEIN: I agree that would be.

23 THE COURT: So, if your client wants to bring a
24 claim that she wasn't given her assistant over that period
25 of time, that's subject to arbitration.

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1 MR. BURSTEIN: Yes, but my point is this, a
2 general breach of confidentiality -- there is no breach of
3 the confidentiality requirements of agreement and
4 certainly not of that paragraph. It might give rise to
5 some other kind of breach excusing performance or giving
6 rise to damages. But when you have an arbitration clause
7 which says that this is a material breach specifically of
8 this arbitration clause, it relates solely to this
9 arbitration clause, that is different. That's the
10 equivalent of the sort of the converse where you say,
11 okay, parties have disputes. But you can't get out of
12 arbitration unless you can show fraud in the securing of
13 the arbitration agreement. Similarly it's the same
14 concept.

15 THE COURT: But doesn't your client's breach
16 excuse any breach after that?

17 MR. BURSTEIN: No. For a number of reasons.

18 THE COURT: Isn't that Contracts 101?

19 MR. BURSTEIN: No -- I mean, yes, of course it's
20 Contracts 101. But you have to look at the allegations.
21 Again, this is not an issue for the arbitrator. This is
22 an issue as to what this clause means, as to whether or
23 not we're to be forced into arbitration. And the things
24 they say that we said are not breaches of the
25 confidentiality provision in the contract. And they --

- J L M -

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1 THE COURT: Are you disputing that if the
2 confidentiality provision is valid and they sought
3 arbitration, that your conduct and the conduct of your
4 client didn't breach that?

5 MR. BURSTEIN: Yes.

6 THE COURT: How?

7 MR. BURSTEIN: Because the confidentiality
8 agreement is very limited. The confidentiality agreement
9 says, "That the performer shall not directly or indirectly
10 disclose, divulge, render or offer any knowledge or
11 information to any other person or party concerning
12 matters relating to any program or Fox affairs and plans."

13 Now, unless they're using the word affairs in
14 the way that Roger Ailes had affairs, this does not relate
15 to their Fox's affairs. That's one confidentiality
16 provision. There is nothing in the record to suggest that
17 Ms. Tantaros or I breached that provision. Then the other
18 one is, "Ms. Tantaros shall not issue any statements or
19 grant any interview concerning performances, services
20 hereunder." No suggestion here that that was breached.
21 Those are the only confidentiality provisions in the
22 agreement.

23 So there is no breach of any confidentiality.
24 The only breach of confidentiality is their admitted
25 breach of trying to rebut legitimate statements that Ms.

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1 Tantaros or I on her behalf, could make with divulging the
2 existence of the arbitration and the terms.

3 How much time do I have so I make sure --

4 THE COURT: You have eight more minutes.

5 MR. BURSTEIN: So let me move on. If you want
6 to talk about sort of the general principle. If you take
7 their argument to a logical end, let's say Bill Shine or
8 one of the other defendants could have raped Ms. Tantaros
9 in the Fox building and that would be subject to
10 arbitration because she was in the building.

11 THE COURT: Wait, that's an intentional tort and
12 that's an assault, right? That's an assault. And there
13 is lots of case law cited in both your briefs that takes
14 assault out of the context of the typical arbitration
15 clause.

16 MR. BURSTEIN: I'll give another one.

17 THE COURT: Is there any assault alleged in this
18 case?

19 MR. BURSTEIN: No.

20 THE COURT: Any physical assault?

21 MR. BURSTEIN: No physical. She trips and falls
22 coming out of the elevator because they didn't
23 adequately -- they were negligent in some way. She
24 wouldn't have tripped and fallen if she hadn't been an
25 employee on their theory. That's arbitrable. Now, here

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1 is what the case law says, everybody cites and of course
2 Your Honor cites to the Tong case. That's really the
3 major case here because it's 1st Department. But nobody,
4 my adversaries haven't bothered to look at Justice ~~Freed~~ ^{g. Fried}'s
5 underlying decision, what the Appellate Division affirmed.
6 And there they had an arbitration agreement, any dispute
7 arising out of this agreement will be subject to
8 arbitration. But as Justice ~~Freed~~ ^{g. Fried} wrote, "Among the
9 conditions the agreement provides that Tong would not
10 disclose any of S.A.C.'s confidential information during
11 or after his employment." This information was defined to
12 include any information relating to the business and
13 personal affairs of any of the principals.

14 Nobody seems to have paid attention to what was
15 actually being affirmed. There was an affirmation of a
16 decision by Justice ~~Freed~~ ^{g. Fried} saying that the broad language
17 of the arbitration agreement applying to breaches of the
18 contract was covered. But the arbitration agreement in
19 that case was radically -- I mean the underlying contract
20 was radically different. So if you read Justice ~~Freed~~ ^{g. Fried}'s
21 opinion, you will see something that is just quite
22 extraordinary and that makes all the difference in the
23 world.

24 The other cases they have cited, like Oldroyd
25 and Powers, they have a number of them, they are all

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1 termination of employment cases. This is a different kind
2 of case. We also have the tortious interference claim
3 which is something different which is a tort claim, not a
4 contract claim. It involves them going out and
5 interfering with the sale of her book.

6 THE COURT: How is retaliation different than
7 termination? Aren't those two sides of the same coin?

8 MR. BURSTEIN: Except that all the cases that
9 they cite are termination clauses and all of those are
10 essentially breach of employment agreements as opposed to
11 here where there is no breach of contract claim.

12 Then, again, the other thing I want to say in my
13 last few minutes is, that if Your Honor is inclined --

14 THE COURT: Speaking of that, five more minutes.

15 MR. BURSTEIN: If Your Honor is inclined to send
16 us to arbitration, I would like the opportunity to amend
17 based upon new information. I learned very recently, just
18 two nights ago, that another one of my clients, who shall
19 remain nameless, was subpoenaed. And I was told by the
20 United States Attorney's office that there is an ongoing
21 criminal investigation of Fox relating to all of these
22 allegations, not just Ms. Tantaros, but all of the sexual
23 harassment allegations. And I have a subpoena, it's
24 ongoing relating to another client, although I suspect
25 that Ms. Tantaros will be subpoenaed. But here is the

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1 point, based upon my discussions with the prosecutors, and
2 they didn't tell me what exactly what it was, but once I
3 saw that it was the securities prosecutors I understood
4 immediately what was going on here, which is that what Fox
5 has done is enter into agreement, after agreement, after
6 agreement, with victims of sexual harassment, not reported
7 them in any of their SEC filings. Because what they do,
8 as they offered Ms. Tantaros when they tried to settle the
9 case, they keep them as employees, per se, so nothing ever
10 gets reported.

11 Now, that's not what the U.S. Attorney says but
12 that's what I think is going on. I now believe-- that
13 not -- that I'm not saying it's necessarily not subject to
14 arbitration, I believe I have a racketeering case here
15 based upon that and the extortions of my client. There is
16 a very strong case law that suggests in this case you will
17 lose your job if you report sexual harassment, gives rise
18 to a pattern of racketeering activity which this Court can
19 look at, and then there are other claims. I have
20 compelling evidence through confidential sources that Fox
21 was involved in electronic surveillance of my client on
22 her private communications in violation of 18 U.S.C. 2510,
23 which has a private right of action. They have been --
24 just today The Times reported that they maintain fake news
25 sites and also what are known as sock puppet accounts,

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1 fraudulent Twitter accounts.

2 THE COURT: You made reference to that in your
3 papers and the complaint extensively.

4 MR. BURSTEIN: Yes, but I have more information
5 about that. I also have the fact that we allege that Fox
6 has subsequently, and this is important, post-employment,
7 has tortiously interfered with Ms. Tantaros's agreement
8 with her speaking agency, who represents numerous other
9 Fox talents and can only represent them with Fox's
10 permission. That they have tortiously interfered with her
11 ability to get speaking engagements.

12 I think that all of this information is very
13 significant. I only need two weeks to amend. I think
14 that if I can allege -- Your Honor, just said it,
15 intentional torts don't fall within an arbitration clause.
16 I didn't bring a RICO case before because I didn't think
17 that I could establish a pattern of racketeering activity.
18 Now that I know that the U.S. Attorney's office is issuing
19 subpoenas and undergoing, according to the subpoena,
20 investigating alleged violations of federal criminal law
21 by Fox, and I figured out exactly what's going on, I can
22 make a RICO case. I can make the argument that the
23 conduct by Mr. Shine and others was an extortion under the
24 Hobbs Act.

25 THE COURT: Two minutes.

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1 MR. BURSTEIN: I got in under the bell. Unless
2 Your Honor has any questions.

3 THE COURT: Not at this time.

4 Rebuttal.

5 MR. LEVANDER: Indeed, Your Honor.

6 May it please the Court, Mr. Burstein has gone
7 way outside the record. I would note that the courts have
8 held that RICO claims, if you could make one, which he
9 can't, would be arbitrable as well.

10 THE COURT: I didn't have any briefing on that
11 so I don't know the answer.

12 MR. LEVANDER: I'll represent that to you. And
13 the antitrust cases follow RICO cases. First of all, we
14 did address the question, he said it was not addressed, I
15 suggest you look at page 22 of our brief when you have a
16 chance, Your Honor. I would like to focus on Siroy and --

17 THE COURT: That's the reply brief you're
18 referring to, counsel?

19 MR. LEVANDER: Yes, exactly. So, it doesn't
20 say, as Mr. Burstein represented to Your Honor a moment
21 ago, that the confidentiality issue, even if you ignore
22 Contracts 101 and you ignore his outrageous behavior and
23 all of that is a breach of the arbitration agreement, it's
24 a breach of the agreement. So, therefore, it is a --

25 THE COURT: Wait. But it's in the arbitration

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1 clause of the agreement.

2 MR. LEVANDER: But it's an agreement of a
3 breach, breach of the agreement. And the courts have said
4 over and over again, and I read to you the --

5 THE COURT: The nuance you're claiming, it's a
6 breach of the agreement but not specifically a voiding of
7 the arbitration clause?

8 MR. LEVANDER: Correct. It also doesn't void
9 the arbitration clause. Only thing that voids an
10 arbitration clause is if you are unconscionable in the way
11 that you created the arbitration clause. Here, as I said,
12 cited to you both federal and state cases, any
13 post-contract conduct that you think is actionable is to
14 be arbitrated. That is what the law is.

15 Indeed, Your Honor, Tong is right on point. It
16 has nothing about harassment in it. It's a harassment
17 case and the Court ordered, the 1st Department ordered the
18 arbitration to occur. This is what you said about Tong in
19 your Siroy opinion. First of all, you're talking about in
20 the Siroy case, it's a harassment, discrimination case and
21 you say, the language in Section 13, that's 13 of the
22 contract, specifically encompasses "all claims," just like
23 it does here, "arising out of or relating to the
24 employment agreement." Exactly what we have here.
25 Nothing about harassment.

- J L M -

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1 Plaintiff's claims of employment discrimination,
2 retaliation, clearly arise in and relate to her employment
3 and are thus governed by Section 13 and covered by her
4 employment agreement, citing Tong. You describe Tong as
5 holding, "That since plaintiff's claims arose out of the
6 events that occurred in the course of his employment by
7 defendant and supervisor, the supervisors of the
8 defendant, they were deemed subject to the employment
9 agreement which covered any dispute or controversy arising
10 out of or relating to the agreement." It's exactly the
11 analysis here. All of her claims arise out of and are
12 related to.

13 THE COURT: What about the tortious interference
14 claim?

15 MR. LEVANDER: He conceded that's subject to
16 arbitration in his earlier papers. And tortious
17 interference is a tortious interference with the contract.
18 So it relates to the contract. It's clear that everything
19 is encompassed by the --

20 THE COURT: And it relates to particularly the
21 book provision within the contract, right?

22 MR. LEVANDER: Right. We are enforcing the book
23 provision and he's saying that enforcement of our
24 contractual right, which is the subject of the arbitration
25 clause, is a tortious interference with the other

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1 contract.

2 THE COURT: Did you say earlier that your
3 arbitration, your arbitration claim only relates to the
4 book and not to the alleged harassment and retaliation
5 claims?

6 MR. LEVANDER: When we first brought the
7 arbitration claims that's exactly what it related to.
8 When this goes forward, I hope in arbitration, it will be
9 expanded, no doubt, to encompass some other things. I
10 suggest, Your Honor, Mr. Burstein said that he waffled on
11 whether or not his client violated the contract. But in
12 Exhibit H --

13 THE COURT: He didn't waffle, he said that she
14 didn't, but really avoided explaining how in a way that
15 was persuasive. I might give him a chance, last chance on
16 that since you raised it.

17 MR. LEVANDER: But Exhibit H to my reply
18 affidavit attaches Mr. Burstein's comments to the press
19 which said that she knows that she's taking a risk in
20 violating her contract's confidentiality clause in making
21 these statements. There is no question that she violated
22 it and they knew that she was violating it when she got
23 involved.

24 Also, the confidentiality agreement that was
25 gone over by Mr. Burstein when he read it covers not only

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1 arbitration but "All relevant allegations and events
2 leading up to the arbitration." So it's broader than what
3 he just said, it encompasses her claims, period.

4 Finally, I would note that Mr. Burstein has
5 tried to inject into here all kinds of extraneous stuff
6 that is not in the record. The fact that he has a male
7 client that may have received a subpoena. Fox has not
8 received a subpoena. Fox would clearly cooperate if there
9 were a subpoena. But that he is trying to somehow make
10 this case not about the arbitration clause, which it is,
11 but to bring in something that has to do with another one
12 of his clients, not this client and not a sexual
13 harassment claim, is beyond the pale.

14 THE COURT: Time. I'm going to address Mr.
15 Burstein one more time because --

16 MR. BURSTEIN: Could I have two minutes?

17 THE COURT: Two minutes. But I specifically
18 want you to address the issue of the breach by your
19 client.

20 MR. BURSTEIN: Sure. I want to make one thing
21 clear, I never said it was a male client, that was Mr.
22 Levander.

23 THE COURT: No, you didn't.

24 MR. BURSTEIN: I never said it was a male client
25 and I want that to be on record.

- J L M -

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1 Second of all, I would ask Your Honor, although
2 neither party did it because I think that there were
3 concerns about confidentiality, I think that both parties,
4 for Your Honor to have a full record, should see the
5 entire employment agreement because it really addresses --

6 THE COURT: Then you could have provided it to
7 me at the time that you submitted the papers or asked for
8 it to be submitted in camera and you haven't done that.

9 MR. BURSTEIN: But they haven't --

10 THE COURT: So explain to me how your client's
11 breach is not a breach.

12 MR. BURSTEIN: My client's breach is not a
13 breach because there is nothing that the other side has
14 shown which makes clear, and if I could have a moment let
15 me just look at what the exhibit that they have.

16 (Pause)

17 MR. BURSTEIN: Well, one of the problems, and
18 maybe this is -- they don't put the full agreement in, so
19 they only give you part of the agreement, they leave out
20 the other part about confidentiality.

21 THE COURT: You did the same.

22 MR. BURSTEIN: I understand. But the point
23 would be, you have nothing before you to show that she
24 violated confidentiality. They haven't submitted any
25 document. They have statements by me, but they haven't

- J L M -

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1 provided the provisions of the agreement that talk about
2 confidentiality. So they say it's a breach but there is
3 nothing in their papers, that as far as I can tell,
4 actually identified what would be a breach of
5 confidentiality.

6 THE COURT: Okay. Can we take a five minute
7 break at this time and then we'll go back on the record.

8 (Short recess taken)

9 THE COURT: On the record. First, I would like
10 to commend counsel on extremely well-prepared,
11 well-organized and capable argument made on the record
12 today, as well as in the papers on the briefing of this
13 case.

14 At this point in time I'm going to render my
15 decision on the record. Plaintiff's employment at Fox was
16 covered by an employment agreement that contained a valid,
17 broad and unambiguous arbitration provision requiring that
18 any controversy, claim or dispute arising out of or
19 relating to this agreement or your employment shall be
20 brought before a mutually selected three member
21 arbitration panel. Ample case laws in both New York State
22 and the Federal Courts has held that all the claims and
23 controversies sought to be litigated by plaintiff fall
24 within the terms of the parties broad arbitration
25 provision. Including her claims under the New York State

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1 Human Rights Law and New York City Human Rights Law for
2 harassment and retaliation, as well as her claims for
3 tortious interference, since those claims arose within the
4 scope of plaintiff's employment and clearly fall within
5 that scope.

6 All of the individual defendants, though they
7 are not signatories to the arbitration agreement, can
8 invoke the arbitration clause and compel arbitration.
9 This would apply even if the claims against them were
10 severed from the claims against Fox. The misconduct
11 alleged by plaintiff relates to these individual's
12 behavior as officers, directors and employees or agents of
13 Fox, and they necessarily relate to their alleged conduct
14 as agents of Fox News. Further, a careful review of the
15 claims against the individual defendants shows that these
16 claims are factually intertwined with the agreement and
17 the claims against Fox News. The claims against the
18 individual defendants involve the very same issues and
19 circumstances. This principle applies equally to the
20 employment claims and the tortious interference claims at
21 issue in this case. Allowing such claims to proceed in
22 court would be contrary to established public policy
23 strongly favoring arbitration of such disputes.

24 Plaintiff's claim that the defendants waived
25 arbitration by materially breaching the arbitration clause

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1 is unsupported by any pertinent case law. That claim is
2 without merit as the defendants have not engaged in
3 protracted litigation that prejudiced the plaintiff. In
4 any event, it was plaintiff who first involved the news
5 media in this dispute in violation of the confidentiality
6 provisions of the parties' agreement. Any remaining
7 claims by ~~defendant~~ ^{Plaintiff} to bring this case outside the scope
8 of arbitration have been considered by the Court and have
9 been found to be without merit.

10 Plaintiff's oral application made for the first
11 time on argument to amend the pleadings is denied. That
12 denial is without prejudice. Defendants' motion to compel
13 arbitration of all of plaintiff's claims against all of
14 the defendants pursuant to CPLR 7503 are granted. Thank
15 you. Pursuant to law, this action is stayed pending its
16 outcome of the arbitration.

17 You can order the transcript, counsel, submit it
18 to me to be so ordered. Then, counsel, you'll have the
19 opportunity to file your notices of appeal.

20 MR. BURSTEIN: Thank you, Your Honor.

21 THE COURT: Thank you, counsel.

22 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

23
24
25 SO ORDERED



JACK L. MORELLI, CM, CSR


DAVID B. COHEN, J.S.C.

3-9-2017

**TANTAROS v.
FOX NEWS**

February 16, 2017

	24:12,13,14,15; 26:13	34:1	25:25;30:9	14:3
[affected (1)	allege (2)	arbitrate (6)	attention (1)
[sic] (1)	14:13	29:5,14	5:8,9;9:13;16:6,6,8	26:14
8:13	affidavit (2)	alleged (7)	arbitrated (3)	Attorney (1)
	17:2;33:18	7:6,23;25:17; 29:20;33:4;37:11,13	3:22;11:24;31:14	28:11
A	affiliate' (1)	allegedly (1)	arbitrationa (102)	Attorney's (2)
	17:11	7:25	3:2,5,24,25;4:4,8, 18,22,24;5:5,14,17, 21,21;6:12,13,19;7:5; 8:17,24;9:24;10:10, 15,20;11:4,8,13,25; 12:1,2,4,7,14,17,17, 18;13:23;14:5,9,13, 17,19;15:2,5,8,8; 16:4,9,15;21:4,17,18; 22:23,19,20,25;23:6, 8,9,12,13,23;24:3; 25:2,10,14;26:6,8,17, 18;27:16;28:14; 29:15;30:23,25;31:7, 9,10,11,18;32:16,24; 33:3,3,7,8;34:1,2,10; 36:17,21,24;37:7,8,8, 23,25,25;38:8,13,16	authority (1)
ability (1)	affiliates (5)	alleges (1)		4:21
29:11	17:10;19:9,10; 20:2,2	22:15		automatically (1)
able (1)	affirmation (1)	allow (2)		8:11
5:6	26:15	6:19;19:5		avoid (2)
absolutely (2)	affirmed (4)	allowed (1)		13:22;15:8
15:17;19:2	14:2,7;26:5,15	5:5		avoided (1)
according (1)	afternoon (3)	Allowing (1)		33:14
29:19	2:1,7,9	37:21		aware (1)
accounts (2)	again (4)	although (5)		3:2
28:25;29:1	10:23;23:21;27:12; 31:4	5:8;16:7;20:22; 27:24;35:1		away (1)
ACCURATE (1)	against (14)	amend (3)		3:16
38:22	2:2;8:13;11:14; 14:1,17,19;15:6; 16:8;37:9,10,15,17, 17;38:13	27:16;29:13;38:11		
acknowledged (1)	agency (2)	Among (1)		B
11:11	3:7;29:8	26:8		back (1)
acquired (2)	agent (2)	Ample (1)		36:7
17:15;18:4	14:10,16	36:21		backwards (1)
acquiring (1)	agents (2)	analysis (2)		16:3
17:16	37:12,14	6:11;32:11		Barney (1)
Act (3)	ago (4)	Andrea (2)		4:2
3:25;7:13;29:24	5:12;10:9;27:18; 30:21	2:1;18:9		Based (7)
action (3)	agree (3)	Andrew (1)		4:20;7:18;8:25; 12:5;27:17;28:1,15
12:14;28:23;38:15	19:3;22:21,22	2:10		basis (2)
actionable (1)	agreed (2)	anodyne (1)		11:24;13:20
31:13	15:7;16:6	11:22		behalf (1)
activity (2)	agreeing (1)	antitrust (4)		25:1
28:18;29:17	21:25	9:7,9,12;30:13		behavior (2)
acts (1)	agreement (74)	appeal (1)		30:22;37:12
13:16	3:21;5:14;7:3; 8:18;9:3;11:23; 14:13;15:3,3;16:14, 20,23;17:2,5,9,11,20, 22,22,24,25;18:7,7,9, 10;19:1,4,6,15,16,20; 20:1,10,14,19;21:17, 20;22:2,3,21;23:3,13; 24:8,8,22;26:6,7,9, 17,18;28:5,5,6;29:7; 30:23,24;31:1,2,3,6, 24;32:4,9,10;33:24; 35:5,18,19;36:1,16, 19;37:7,16;38:6	Appeals (10)		bell (1)
actual (1)	agreements (3)	4:2,3,5,12;10:21; 13:1,3;14:2,7,7		30:1
13:5	Alles (4)	appear (1)		beneficiaries (2)
actually (6)	2:2,12,15;24:14	5:10		17:23;20:12
8:5;12:21,22; 16:11;26:15;36:4	air (1)	appearance (1)		beneficiary (1)
added (1)	11:2	2:5		16:16
20:5	allegations (4)	appearances (1)		benefit (5)
additional (2)	23:20;27:22,23;	11:9		17:9,24;19:8;20:1, 13
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20:19;30:14;34:14, 18		application (1)		Bill (1)
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addresses (1)		10:11		13:23
35:5		applies (1)		blacked (1)
adequately (1)		37:19		18:20
25:23		apply (4)		book (5)
admitted (1)		9:4;18:12;22:13; 37:9		12:5;27:5;32:21, 22;33:4
24:24		applying (1)		both (6)
admittedly (1)		26:17		3:22;6:24;25:13; 31:12;35:3;36:21
16:13		approval (4)		bothered (1)
adversaries (1)		6:23;10:12,24; 14:24		26:4
26:4		arbitrable (2)		box (1)
Aetna (1)				
10:25				
affairs (5)				

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(1) [sic] - box

**TANTAROS v.
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